

2014 WL 5501565 (Colo.Dist.Ct.) (Trial Motion, Memorandum and Affidavit)  
District Court of Colorado.  
Denver County

Harold RIVERS and the Estate of Leanne Hund, Plaintiff,  
v.  
Marshall L. SMITH and Ada Edith Smith, Defendants.

No. 2014CV30481.  
September 10, 2014.

Courtroom: 280

**Prayer for Relief and Motion to Reconsider Award of Attorney Fees Against Plaintiff's Counsel, Titus D. Peterson, Based Upon Newly Discovered Evidence and or for Clarification of this Honorable Judge's Order**

[Titus D. Peterson](#), 600 17th St., Suite 2800, Denver, Colorado 80202, Phone Number: 303-260-6412, E-mail: [tiusdp@msn.com](mailto:tiusdp@msn.com), Fax Number: Not provided, Atty. Reg. #: 19926, for the plaintiff.

Judge Lemmon.

720-865-8305

Comes now the Attorney for the Plaintiffs, Harold Rivers and the Estate of Leanna Hund, Titus Peterson and does ask this most honorable court to reconsider its order awarding \$3,800 worth of attorney fees against him for the Plaintiffs filing a motion to disqualify opposing counsel from representing both Mr. and Mrs. Smith. Plaintiff's counsel requests this reconsideration on two grounds: First, there is newly discovered evidence (evidence that was not available at the hearing and only came to the full attention of Plaintiff's counsel today) and; secondly, Plaintiff's counsel asks this honorable court to make a more clear record as to the award of attorney fees based upon the provisions of C.R.S. 13 --17-102.

***DUTY TO CONFER***

Based on a standing agreement between Plaintiff's Counsel and Defense Counsel the parties agreed to object to each other's motions as a matter of course unless specifically agreed to otherwise. So, the Defense objects.

***PRAYER FOR RELIEF***

1. In the initial pleading Plaintiff's counsel, at the suggestion of the Plaintiff, asked this court to inquire as to whether counsel for the Defense had a conflict of interest. To be clear, counsel for the Plaintiff is not asking this court to reconsider its earlier order finding that there was not conflict. Plaintiff's counsel is satisfied with the sage and seasoned judgment of this court and the professionalism of opposing counsel.
2. Nevertheless, with that said, Plaintiff's counsel does request that this honorable court consider the following "newly discovered evidence" in determining whether in fact Plaintiff's counsel's filing of the motion was "vexatious, groundless, or frivolous".

3. Secondly, if the court does so find that Plaintiff's Counsel was "vexatious, groundless and frivolous in filing this request on behalf of his client" Mr. Peterson beseeches this honorable court to make further findings of fact so a clear record can be created to support its order.

### ***I. ARGUMENT REGARDING NEWLY DISCOVERED EVIDENCE***

4. When the initial motion to disqualify was filed Plaintiff's counsel only knew that the Defendant Marshall Smith was 85. Mistakenly, Plaintiff's counsel believed that Mrs. Smith was 82. According to Defense Counsel Mrs. Smith is actually 86.

5. Mr. Peterson was concerned, as was his client that his client would go through the expense and emotion of trial only to have any judgment overturned for ineffective counsel. Going to the expense of trial, only to have the verdict overturned, would work not only a **financial** hardship on the Plaintiff but take a huge, unquantifiable toll on the Plaintiff who has had to suffer not only the loss of his wife but the insult of the Defendants Smiths insistence in the face of overwhelming evidence that he was not even at the scene of the accident or was involved in no wrong doing. Defense counsel has not attended even one deposition.

6. Mr. Peterson has extensive experience with working with the **elderly**. Not only did he work for about seven years with **elderly** people, on behalf of a woman who ran seven assisted living facilities, but Mr. Peterson also personally cares for an 89 year old uncle. Mr. Peterson is very aware of the creeping dimensions of alzhiemiers but he also knows that the **elderly** are exceptionally adroit at hiding their progressive disability and limitations.

7. Mr. Peterson filed the motion because he was concerned that Mr. Houston might not have had the opportunity to be fully trained in how to identify the symptoms and motives of the **elderly** (e.g to continue to drive) which are often masked by anger, being over bearing and astuteness of the **elderly** to hide their problems -- not to mention how those factors could be used to undermine the systems of justice.

8. To remind the court, Mr. Peterson never specifically requested a hearing on this issue. Instead, Mr. Peterson suggested in his reply (to the motion to disqualify) that "Mr. Houston might be right". Mr. Peterson also suggested, but never insisted, that it MIGHT be prudent for the court to have a hearing to inquire into these matters. It was the court, on its own initiative, that ordered the hearing and ordered Mr. Peterson to force the defendants to appear.

9. At the hearing, Mr. Smith did not appear. Only Mrs. Smith. The court, therefore, only inquired "in camera" with Mrs. Smith.

10. The hearing date was set on the same date as Mr. Peterson's return date for his Subpoena duces tecum documents. The City Attorney appeared at the hearing to turn over the documents. Upon receipt it was found that at least the disc containing the 911 calls was corrupted and would need to be replaced. The 100s of sheets of the paper copies of the police report appeared, at first glance, to be identical to what had earlier been provided by Mr. Houston in his initial disclosures. Upon careful inspection, however, and after a certain amount of time, it was revealed that the Denver City Attorney's copies contained information that had never been provided to Mr. Peterson prior.

11. At the hearing (that the court insisted on setting) to disqualify Defense counsel, this honorable court queried Plaintiff's counsel on what the possible conflict might exist. Plaintiff's counsel repeated those arguments already laid out in the initial motion.

12. Among other arguments that Plaintiff's counsel made was that if either Mr. or Mrs. Smith had dementia it would be difficult if not impossible for them to recognize any potential for conflict not to mention agree to it and then knowingly sign a paper waiving or agreeing to it.

13. At that hearing, Mr. Peterson stated that a witness Pearl Marshbank (housekeeper for Mr. Smith) had testified under oath that Mr. Smith "was clear in the head."

14. What Mr. Peterson did not know, because he had not been provided it in discovery by Mr. Houston, was that the police reports provided by the City Attorney would reveal that Mrs. Smith had called 911 the day before Leanna Hund was run over, complaining that Mr. Smith was missing or lost, that he gets lost a lot, and that she thought he had some sort of dementia.

15. A copy of the page from the police report provided by the Denver City's Attorney is attached as exhibit "A at the pages 33 and 34" to this motion.

16. The 911 tape has been transcribed and is attached. It reveals:

- a. That Mrs. Smith is Mr. Smith's caretaker. Page 2 line 21-22
- b. Mr. Smith basically spends almost every night at Mrs. Smith's house. Page 3 lines 19-20.
- c. Mrs. Smith thinks Mr. Smith "has no business driving a car", page 10 line 16-20
- d. Mrs. Smith thinks Mr. Smith has "old timer's" or "alzhiemiers". Page 3 line 19-20
- e. When asked why she thinks Mr. Smith has Alzheimer's by the 911 operator she says:
  - i. He often doesn't even know what day it is
  - ii. And that he gets lost often and does not know where he is. Page 7 line 14-19.

17. Mr. Peterson is unclear as to why he was not provided either this page of the police report or the actual 911 tapes before, when the Defense disclosed the police report and provided copies to Mr. Peterson.

18. It seems reasonable that this information should have been provided by Mr. Houston in the Defense's initial disclosure if it was in his possession. Mr. Peterson, during his five year tenure in the DA's office never withheld this sort of information from a defense attorney during a criminal case.

19. Mr. Peterson would like to remind this court, however, that he did file a motion to compel at the beginning of this case. At that time, I was not getting the discovery in this case in a timely fashion. The court ruled against that motion -- never hearing Mr. Peterson's full argument.

20. Although an award of attorney fees against plaintiff's attorney is an appropriate use of trial court's discretion when an attorney's allegations are not supported by a competent investigation or facts to support the allegations *Carder Inc. v. Cash*, 97 P.3d 174 (Colo. App. 2003) a trial court is not obligated to assess attorney fees as a sanction for a violation of this CRS 13-17-102 when the attorney present[s] a rational argument, based on documentary evidence [...] in support of his position. *E-470 Pub. Hwy. Auth. v. Jagow*, 30 P.3d 798 (Colo. App. 2001), aff'd on other grounds, 49 P.3d 1151 (Colo. 2002).

21. In the immediate case, the court never heard from Mr. Smith. So, no full record could be made.

22. Instead, the Court presumably relied upon the truthful representations of Mr. Peterson; who based his information upon Mrs. Marshbank's deposition testimony.

23. However, on August 4<sup>th</sup>, 2014, Plaintiff's attorney at last discovered statements of Mrs. Ada Smith, These could not have been discovered beforehand due to circumstances out of Mr. Peterson's control (e.g. the CD with the 911 tapes was corrupted and had to be replaced)

24. According to reports to the police the day before Leanna Hund was killed, Mrs. Smith believed her husband had dementia of some sort. At least this is what she reported to the police. For proof look at pages 33 and 34 of Exhibit "A" Attached.

25. Mrs. Smith is in a much better position to know the mental state of her ex-husband: who sleeps at her house; who she sees on a regular basis; who she had known for years; than Mrs. Marshbank -- who only sees Mr. Smith once a week and only knew him for three months and no longer works for him.

26. These revelations are important to the issue of awarding attorney fees for filing the motion to disqualify. Mrs. Smith told the Denver Police that her husband has some sort of dementia and that she is also his caretaker. This suggests that Mr. Smith may not be able to recognize any conflicts he may be in with his ex-wife.

27. The potential conflict of interest is highlighted by recent settlement discussions between Mr. Peterson and Mr. Houston. During these discussions, offers have been made that if Mr. River's will dismiss out Mrs. Smith; this will leave Mr. Smith alone to go to trial. Presumably a judgment (if it is obtained) will only be against him. At trial, Mr. Smith will take the 5<sup>th</sup> -- at least his answers to interrogatories suggests this. So the jury will have to rely upon Mrs. Marshbank's assessment and Mrs. Smith's. He did this negligently if not intentionally; because he was in his right mind.

28. Based upon the 911 calls, Mrs. Smith potentially knew that Mr. Smith may be moving into a time in his life where cannot fully appreciate what he is doing. She probably understands that until the criminal case is complete Mr. Smith will not take the stand. On the other hand, if she is not in the case, and he takes the stand the jury could potentially see that he is not cognizant of what has occurred and find him "not negligent" -- but she will be out of the way and not responsible for acting more decisively to protect the public from her own negligence -- getting the car away from Mr. Smith.

29. Mrs. Smith, in order to save her own **financial** house and to defend herself against accusations of negligently entrusting her vehicle to a man who she knows has dementia, potentially could be strategizing to allow Mr. Smith to shoulder all the responsibility for Mrs. Hund's death so she can end up owing nothing. Given that she is his caretaker she could convince him of this

30. In his defense, Mr. Houston, seemed genuinely surprised when I informed him of the contents of the 911 call and the police report "exhibit A page 33 and 34 I am loath to believe that Mr. Houston sanitized the file he received from the Denver DA's office before sending me a copy; at least without notifying Plaintiff's counsel that he was preparing some sort of log of non-disclosed items.

## ***II. REQUEST FOR CLARIFICATION OF THE RECORD***

31. When a party requests a hearing regarding the award of attorney fees and costs under [§ 13-17-102](#), the trial court must conduct an evidentiary hearing. Because the trial court denied the motion without conducting a hearing on defendant's motion for sanctions, remand is required for a hearing. [141 P.3d 871 \(Colo. App. 2005\)](#).

32. As used in this article 13-1 7-102, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

33. In the immediate case this court held a hearing on the issue of whether the defense counsel should be disqualified. The Plaintiff has no interest in litigating this issue again and stands upon the judge's sound judgment and that of defense counsel.

34. Instead, based upon this newly discovered evidence, Mr. Peterson requests that this court find that his filing this motion was not "substantially frivolous, substantially groundless or substantially vexatious".

35. “Frivolous” defined. A claim or defense is frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim or defense. *W. United Realty, inc. v. Isaacs*, 679 P.2d 1063 (Colo. 1984); *Hart & Trinen v. Surplus Elecs. Corp.*, 712 P.2d 491 (Colo. App. 1985); *Merrill Chadwick Co. v. October Oil Co.*, 725 P.2d 17 (Colo. App. 1986); *Fox v. Div. Eng. For Water Div. 5*, 810 P.2d 644 (Colo. 1991); *SaBell's, Inc. v. City of Golden*, 832 P.2d 974 (Colo. App. 1991), cert. denied, 846 P.2d 189 (Colo. 1993); *Little v. Fellman*, 837 P.2d 197 (Colo. App. 1991); *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 992 P.2d 1188 (Colo. App. 1999), aff'd in part and rev'd in part on other grounds, 17 P.3d 797 (Colo. 2001); *E-470 Pub. Hwy. Auth. v. Jagow*, 30 P.3d 798 (Colo. App. 2001), aff'd on other grounds, 49 P.3d 1151 (Colo. 2002); *Collins v. Colo. Mountain Coil.*, 56 P.3d 1132 (Colo. App. 2002); *Wheeler v. T.L. Roofing, Inc.*, 74 P.3d 499 (Colo. App. 2003); *Double Oak Constr., L.L.C. v. Cornerstone Dev, int'l, L.L.C.*, 97 P.3d 140 (Colo. App. 2003).

36. Mr. Peterson's request that the court make a clear record regarding the issue of filing motion to alert the court of a potential of conflict was not substantially frivolous. The motion was filed to protect the integrity of the procedure. The truth remains to unfold. Before, the discovery of the 911 tapes, it appears that Mrs. Smith was willing and, presumably able, to cause her ex-husband to take total responsibility for what occurred on January 9, 2014. It was only with the recent discovery (the discovery was recent because the 911 tape initially provided by the Denver City Attorneys Office was corrupted and had to be recopied and replaced) that Plaintiff's counsel actually had evidence that she, Mrs. Smith told the 911 police operator that Mr. Smith had “old timer's”.

37. Mr. Peterson's filing the motion to disqualify was justified and correct. The rational basis for the motion was to protect the procedure and by doing so protect Mr. Peterson's client. If Mrs. Smith had gotten away with denying that she knew her husband had problems thinking clearly, driving safely, and denying that she was aware of the profundity of Mr. Smith's dementia, Mr. Rivers would have only discovered this fact after the conclusion of the criminal case, when Mr. Smith was examined by probation, if at all.

38. If Mr. Peterson had not issued subpoena duces tecums, Mr. Peterson's client would have been denied the reports and evidence that would have implicated Mrs. Smith for negligent entrustment. Now that Mr. Peterson has them, the evidence suggests that this entire time Mrs. Smith has been strategizing to get herself out of the case by painting Mr. Smith as completely normal in spite of the fact that apparently, according to what the police were told, he is not.

39. Fighting on behalf of one's client, notifying the court of a potential problem, and preventing one's client from accessing having to access the scales of justice numerous time, by ferreting out that someone is using the system to be less than truthful or gaming the system, is not substantially frivolous nor is it groundless.

40. “Groundless” defined. A claim or defense is groundless if the allegations of the complaint, while sufficient to survive a motion to dismiss for failure to state a claim, are not supported by any credible evidence at trial. *W. United Realty, Inc. v. Isaacs*, 679 P.2d 1063 (Colo. 1984); *Alt Aerial Applicators, Inc. v. Irvine*, 684 P.2d 949 (Colo. App. 1984); *Merrill Chadwick Co. v. October Oil Co.*, 725 P.2d 17 (Colo. App. 1986); *In re Marshall*, 781 P.2d 177 (Colo. App. 1989), cert. denied, 794 P.2d 1011 (Colo. 1990); *Little v. Fellman*, 837 P.2d 197 (Colo. App. 1991); *Zick v. Krob*, 872 P.2d 1290 (Colo. App. 1993); *Travers v. Rainey*, 888 P.2d 372 (Colo. App. 1994); *Engel v. Engel*, 902 P.2d 442 (Colo. App. 1995); *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 992 P.2d 1188 (Colo. App. 1999), aff'd in part and rev'd in part on other grounds, 17 P.3d 797 (Colo. 2001); *E-470 Pub. Hwy. Auth. v. Jagow*, 30 P.3d 798 (Colo. App. 2001), aff'd on other grounds, 49 P.3d 1151 (Colo. 2002); *Collins v. Colo. Mountain Coll.*, 56 P.3d 1132 (Colo. App. 2002); *Wheeler v. T.L. Roofing, Inc.*, 74 P.3d 499 (Colo. App. 2003).

41. Test for “groundlessness” assumes that the proponent has a valid legal theory but can offer little or nothing in the way of evidence to support the claim. *Bilawsky v. Faseehudin*, 916 P.2d 586 (Colo. App. 1995). In the immediate case, prior to the discovery of the 911 tape of Mrs. Smith, Mr. Peterson had a valid theory (i.e. that Mr. Houston's client's had diametrically and incompatible, opposed defenses: (e.g. either Mr. Smith is clear in the head and thus fully responsible/ Ada Smith's best defense...or Mr. Smith is demented and should not have been allowed to drive by Ada who claims in the 911 tapes that she

manages his affairs and owns the car he was driving/ Mr, Smith's Defense) but little or nothing in the way of evidence to support it.

42. Now, however, with the discovery of the 911 tape the motion to disqualify was not groundless. Mr. Peterson's suspicions, based on years of working with the **elderly**, are confirmed. There is a rational basis based upon the evidence for the motion: Mr. Smith, at least according to what Mrs. Smith reported to the police, "has no business behind the wheel of a car [she legally controls]." Mr. Peterson should not be penalized because he brought the potential conflict issue to the attention of this honorable court in spite of the fact that the court decided in favor of allowing the Defendants to proceed to trial when one of them is demented according to the other.

43. Where there is a rational basis grounded in law and evidence for plaintiff's claim, the trial court's finding that these claims were frivolous is not sustainable, *Hart & Trinen v. Surplus Elecs. Corp.* 712 P.2d 491 (Colo. App. 1985). Mr. Peterson requests that this honorable court make a clear record, spelled out fully, so that he can understand, as to why his filing his motion was "groundless" or "Frivolous".

44. To be clear, Mr. Peterson is not requesting a further hearing on this matter. That issue is decided. Instead, I only respectfully request a fully articulated set of findings so that I can understand this judge's sage ruling.

45. "Vexatious" claim is one brought or maintained in bad faith to annoy or harass and may include conduct that is arbitrary, **abusive**, stubbornly litigious or disrespectful of truth. *Bockar v. Patterson*, 899 P.2d 233 (Colo. App. 1994); *Engel v. Engel*, 902 P.2d 442 (Colo. App. 1995); *O'Neill v. Simpson*, 958 P.2d 1121 (Colo. 1998); *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 992 P.2d 1188 (Colo. App. 1999), *aff'd in part and rev'd in part on other grounds*, 17 P.3d 797 (Colo. 2001); *City of Holyoke v. Schlachter Farms R.L.L.P.*, 22 P.3d 960 (Colo. App. 2001); *E-470 Pub. Hwy. Auth. v. Jagow*, 30 P.3d 798 (Colo. App. 2001), *aff'd on other grounds* 49 P.3d 1151 (Colo. 2002); *Mitchell v. Ryder*, 104 P.3d 316 (Colo. App. 2004).

46. During the hearing on the disqualification this court's shrill demeanor and wrathful voice suggested that she thought that Mr. Peterson was being disrespectful to Mr. Houston. Mr. Peterson was dismayed at this intimation. The tone of the Court suggested to Mr. Peterson, by his mistakenly using Mr. Houston's first name, that the court believed Mr. Peterson was either slighting Mr. Houston for racial reasons or due to his age.

47. For the record Mr. Peterson informs this court of the following:

- a. Mr. Peterson was married to a woman of a different race for 24 years.
- b. Mr. Peterson has not one, but two, interracial children by this same woman,
- c. Mr. Peterson has a nephew who is .25 percent African American, 25 percent Hispanic and .25 percent Jewish.
- d. Mr. Peterson worked for LARASA
- e. Mr. Peterson was arrested at the South African Embassy Fighting Apartheid in 1985 at a time when such activities kept people out of law schools.
- f. Mr. Peterson has a long history of working on and for Civil Rights issues.
- g. Mr. Peterson addressed Mr. Houston as Marcus because Mr. Peterson likes Mr. Houston, thinks he is a brilliant and talented lawyer, has enjoyed their professional relationship, and Mr. Peterson, due to this admiration, forgot his manners.

48. Mr. Peterson was not and never has attempted to be “stubbornly litigious” or “disrespectful of the truth”. To the contrary, Mr. Peterson had concerns and still has concerns, based upon a long experience with the **elderly** and a certain expertise he has garnered through the years with them. Moreover, Mr. Peterson's client has a vested interest in making sure that Mrs. Smith's motives for hiding this fact are fully exposed to the light of day. By hiding her ex-husbands dementia from her lawyer, Mrs. Smith can make Mr. Smith take all the **financial** responsibility for what happened to the Plaintiff's wife and she can escape unscathed. Better still, hide evidence, avoid depositions and get out of the case on summary judgment; then have her husband revealed as lost in time, for the first time, in front of a jury.

49. By hiding what she knows from her attorney, Mrs. Smith can make Mr. Smith unwittingly responsible for an accident he may not even know he had. This suspicion, is further suggested by the recent 911 revelations.

50. The Plaintiff raised all these issues so that there is a clean trial with no post judgment surprises. That is not vexatious. That is smart! That is necessary not only to protect Mr. River's but to protect justice! That is what is needed to protect the judicial process so that it is fair to all...including both of Mr. Houston's clients as well as Mr. Peterson's. Filing motions that do this does not justify the court in making punitive awards of attorney fees against Mr. Peterson.

51. The Defendant, Marshall Smith, is 85 years old. He is in poor health. He has missed his last two appearances in his criminal case and never appeared in front of this court when he was ordered to in this case. And Mr. Peterson gets sanctioned?

52.

### **CONCLUSION**

In conclusion, Mr. Peterson is very thankful to this court that the award of attorney fees was directed at him and not at his client; a person who has undergone much suffering and continues to suffer in his attempt to find some justice in this system. For the court to have done otherwise would have added insult to grave injury. Thank you for your compassion.

Wherefore, Mr. Peterson respectfully asks this court to reconsider the award of attorney fees against him. This reconsideration should be based upon the newly discovered evidence suggesting that Mrs. Smith has a motive for encouraging and hiding the conflict (easier to bargain away her responsibility as “caretaker” by leaving her deteriorating ex-husband in the position to shoulder the entire fault).

More importantly, however, Mr. Peterson simply and only asks to be relieved of the punitive aspect of having to pay attorney fees. The motion that Mr. Peterson filed, as this evidence now reveals, was not and never was substantially groundless, nor was it substantially vexatious nor was it frivolous. There is and was a substantial risk that justice was going to be subverted in this case due to failure to properly disclose evidence behind a veil of subterfuge and confusion. The Plaintiff is not seeking or asking this court to rule that there is a conflict.

In the alternative, if the court insists of punishing Mr. Peterson for trying to protect the integrity of the civil justice system, for acting as an officer of the court, for trying to protect his client, for even trying to protect Mr. Marshall Smith from being found solely **financially** responsible for something he possibly didn't even know he did (to wit: kill my client's wife in cold blood) then I ask this court to make a clear and resounding record on why the motion was substantially frivolous, groundless, and or vexatious and explain according to the law why Mr. Peterson should pay for the fees for a hearing he never ordered only suggested was prudent.

Respectfully submitted by:

s/ Titus D. Peterson



Titus D. Peterson attorney for the Plaintiffs

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